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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 M.A. MORTENSON COMPANY, a foreign
11 corporation,

12 Plaintiff,

13 v.

14 ZURICH AMERICAN INSURANCE
15 COMPANY, a foreign corporation,

16 Defendant.

Case No. C21-1407RSM

ORDER TRANSFERRING VENUE

17 This matter comes before the Court on Defendant Zurich American Insurance Company
18 (“Zurich”)’s Motion to transfer this action to the Southern District of New York pursuant to the
19 first-to-file doctrine and 28 U.S.C. § 1404(a). Dkt. #5. The instant case was filed in King
20 County Superior Court on October 14, 2021, and removed the same day. Dkt. #1-1. Zurich
21 contends this case should be transferred so it can be considered along with *Polcom USA, LLC v.*
22 *Affiliated FM Insurance Company*, Case No. 1:20-cv-09206-NRB (the “New York Lawsuit”),
23 filed a year earlier on November 4, 2020. Both cases deal with “whether and to what extent
24 Zurich and another insurer are obligated to pay for claims for water damage to prefabricated
25 modular hotel rooms caused by rainwater intrusion.” Dkt. #5 at 6. The plaintiff in the New
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1 York Lawsuit, Polcom, contracted with the Plaintiff here, M.A. Mortenson Company
 2 (“Mortenson”), to manufacture and ship 228 pods for a hotel project. Water damage allegedly
 3 occurred at the Port of Everett as they were being shipped to the Seattle job site. *See id.* at 7.
 4 The plaintiffs seek insurance coverage from Zurich and Affiliated FM Insurance Company
 5 (“FM Global”), Defendants.
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7 Under the “first to file” rule, when cases involving the same parties and issues have
 8 been filed in two different districts, the second district court has discretion to transfer, stay, or
 9 dismiss the second case in the interest of efficiency and judicial economy. *See Cedars-Sinai*
 10 *Medical Center v. Shalala*, 125 F.3d 765, 769 (9th Cir. 1997). “The first-to-file rule was
 11 developed to ‘serve[] the purpose of promoting efficiency well and should not be disregarded
 12 lightly.’” *Alltrade, Inc. v. Uniweld Products, Inc.*, 946 F.2d 622, 625 (9th Cir. 1991) (citation
 13 omitted). The Ninth Circuit Court of Appeals has noted that, although no precise rule has
 14 evolved, “the general principle is to avoid duplicative litigation, and to promote judicial
 15 efficiency.” *Barapind v. Reno*, 225 F.3d 1100, 1109 (9th Cir. 2000) (internal quotations and
 16 citations omitted).

17 The rule “is not a rigid or inflexible rule to be mechanically applied, but rather is to be
 18 applied with a view to the dictates of sound judicial administration.” *Pacesetter Sys., Inc. v.*
 19 *Medtronic, Inc.*, 678 F.2d 93, 95 (9th Cir. 1982); *see also Alltrade*, 946 F.2d at 627-28. Thus, a
 20 court “can, in the exercise of [its] discretion, dispense with the first-filed principle for reasons
 21 of equity.” *See Alltrade*, 946 F.2d at 628. More specifically, “[t]he circumstances under which
 22 an exception to the first-to-file rule typically will be made include bad faith, anticipatory suit,
 23 and forum shopping.” *Id.* (internal citations omitted).

1 In *Alltrade*, the Ninth Circuit Court of Appeals set forth three prerequisites for
 2 application of the first to file rule: (1) chronology of the two actions; (2) similarity of the
 3 parties; and (3) similarity of the issues. *See* 946 F.2d at 625.

4 Zurich addresses these factors:

5 Here, all three factors favor transfer to the Southern District of
 6 New York. First, Polcom filed the New York Lawsuit nearly one
 7 year before Mortenson filed the complaint in this action. After
 8 Judge Buchwald's ruling denying most of FM Global's Rule
 9 12(b)(6) motion, there is no reason to believe that it will be
 10 dismissed on non-substantive grounds. Second, the parties in the
 11 cases are overlapping. Zurich is a defendant in both this action and
 12 the New York Lawsuit. The plaintiffs in the two suits are different
 13 but their interests overlap; Polcom and Mortenson are suing Zurich
 14 for overlapping damages, and Zurich will likely seek a declaration
 15 against both regarding whether any further payments are required
 16 of Zurich, and if they are, to which plaintiff. Transferring this case
 17 to the Southern District of New York will likely result in the judge
 18 in the New York Lawsuit having all parties before her so that
 19 complete relief to all parties can be provided.

20 The first-to-file rule does not require "exact identity" of the parties,
 21 but only "substantial similarity" of the parties....

22 This case and the New York Lawsuit unquestionably arise out of
 23 the same nucleus of operative facts -- how much water damage to
 24 the pods occurred at the Port of Everett and how much occurred at
 25 the jobsite. Both cases will require that the respective courts
 26 interpret the same clauses in the Zurich Policy, and to determine
 27 whether the water damage occurring at the Port is covered by the
 28 Zurich Policy, the FM Policy, both, or neither.

Dkt. #5 at 11–12.

Plaintiff Mortenson argues that the Zurich is seeking transfer "to slow the pace of
 litigation and delay, for as long as possible, resolution of Mortenson's claims." Dkt. #17 at 6.
 Mortenson primarily leans on the 28 U.S.C. § 1404 factors, detailed below, to justify keeping
 this case here. *Id.* at 13–18. Mortenson also argues the instant action was first filed because it
 "commenced this lawsuit suit [sic] on September 15, 2021, by service on the Washington State

1 Insurance Commissioner and personally on Zurich at its Schaumburg, Illinois headquarters”
 2 and because “Zurich was not a defendant in the New York action until Polcom filed its
 3 amended complaint on September 16, 2021—the day after Mortenson commenced this
 4 litigation.” *Id.* at 10.

5 Under 28 U.S.C. § 1404, this Court has discretion to transfer this case in the interests of
 6 convenience and justice to another district in which venue would be proper. *See Jones v. GNC*
 7 *Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000). Specifically, Section 1404(a) states:

8 For the convenience of parties and witnesses, in the interest of justice, a
 9 district court may transfer any civil action to any other district or division
 10 where it might have been brought or to any district or division to which all
 11 parties have consented.

12 28 U.S.C. § 1404(a). The purpose of this statute is to “prevent the waste of time, energy, and
 13 money and to protect litigants, witnesses and the public against unnecessary inconvenience and
 14 expense.” *Pedigo Prods., Inc. v. Kimberly-Clark Worldwide, Inc.*, No. 3:12-CV-05502-BHS,
 15 2013 U.S. Dist. LEXIS 12690, 2013 WL 364814, at *2 (W.D. Wash. Jan. 30, 2013) (quoting
 16 *Van Dusen v. Barrack*, 376 U.S. 612, 616, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964)).

17 In the Ninth Circuit, district courts typically apply a nine-factor balancing test to
 18 determine whether to transfer a case under § 1404(a), examining: “(1) the location where the
 19 relevant agreements were negotiated and executed, (2) the state that is most familiar with the
 20 governing law, (3) the plaintiff’s choice of forum, (4) the respective parties’ contacts with the
 21 forum, (5) the contacts relating to the plaintiff’s cause of action in the chosen forum, (6) the
 22 differences in the costs of litigation in the two forums, (7) the availability of compulsory
 23 process to compel attendance of unwilling non-party witnesses, [] (8) the ease of access to
 24 sources of proof, and (9) the public policy considerations of the forum state.” *Jones*, 211 F.3d
 25 at 498-99.

Based on the record before it, the Court is convinced that this case is properly transferred under the first-to-file rule. The New York Lawsuit was filed first. Zurich was added as a Defendant in that action before this case was filed, in any event it had always been an interested party. The instant case was anticipatory. The cases involve the same incident and the same insurance contracts will be at issue. Although the Court is sympathetic to Plaintiff's concern of transfer causing further delay, the New York case is significantly further along than this one. The purpose of § 1404 is to "prevent the waste of time, energy, and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense." Keeping this action here will result in a duplication of Court resources and potentially conflicting rulings. The Court has considered all of the factors above and finds that a transfer is warranted in the interest of justice.

Having reviewed the relevant pleadings and the remainder of the record, the Court hereby FINDS and ORDERS that Defendant Zurich American Insurance Company (“Zurich”)’s Motion to transfer this action, Dkt. #5, is GRANTED. This matter is hereby TRANSFERRED to the United States District Court for the Southern District of New York for all further proceedings.

DATED this 21st day of December, 2021.



RICARDO S. MARTINEZ
CHIEF UNITED STATES DISTRICT JUDGE